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2  
3 UNITED STATES DISTRICT COURT  
4 EASTERN DISTRICT OF WASHINGTON  
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6  
7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 v.

10 FRANCISCO OSUNA-ARMENTA,

11 Defendant.  
12

NO. CR-10-041-JLQ

MEMORANDUM OPINION RE:  
SENTENCING GUIDELINE  
CALCULATION

13  
14 On April 6, 2010, Plaintiff was indicted for being an Alien in the United States  
15 After Deportation in violation of 8 U.S.C. § 1326. He pled guilty on August 10, 2010.  
16 The sentencing hearing took place on October 8, 2010.

17 The Defendant objected to the Presentence Investigative Report's  
18 recommendation for the application of the sixteen-level "crime of violence" sentence  
19 enhancement under § 2L1.2(b)(1)(A)(ii) of the U.S. Sentencing Guidelines (U.S.S.G.)  
20 based upon his prior conviction of the felony crime of Unlawful Imprisonment. Prior to  
21 sentencing, the Government did not respond to Defendant's objection. At the sentencing  
22 hearing the Government orally advocated for the application of the "crime of violence"  
23 enhancement to the Offense Level and in support, submitted state court records for the  
24 court to consider.

25 The court found that the 16-level "crime of violence" enhancement applied and  
26 determined the Offense Level to be 21, the Criminal History Category IV, and the  
27 Guideline Range 57-71 months. The court exercised its discretion and, after considering  
28 the factors set forth in 18 U.S.C. § 3553(a), sentenced the Defendant to incarceration for

1 a period of 36 months to be followed by 3 years of Supervised Release.

2 After the sentencing hearing, recognizing the evolving state of the law in this  
3 "crime of violence" sentencing area, the court stayed the execution of the judgment and  
4 permitted the parties time to brief the court on the issue. Ct. Rec. 33. After review of the  
5 parties' written submissions and further reading of the law, the court continues in its  
6 determination that the "crime of violence" enhancement to the Offense Level of the  
7 Guidelines applies.

8 **I. FACTS RE: UNLAWFUL IMPRISONMENT CONVICTION**

9 On November 15, 2005, the Defendant pleaded guilty to the Washington state  
10 felony offense of Unlawful Imprisonment in violation of RCW 9A.40.040(1). He was  
11 sentenced to 35 days imprisonment and 12 months community custody with the  
12 condition that he undergo anger management treatment.

13 At the sentencing in the matter before this court, the Government submitted to the  
14 court several documents related to the Defendant's prior conviction including: (1) the  
15 Information charging Defendant with Unlawful Imprisonment (ex 3); (2) the Statement  
16 of Defendant On Plea of Guilty to Non-Sex Offense (ex 1); (3) the Felony Judgment and  
17 Sentence (Ex 2); (4) the Motion and Affidavit for Arrest and Detention (Ex 4); and (5)  
18 the Quincy Police Department Offense Reports (Ex. 5). The police incident reports state  
19 that on October 10, 2005 the Defendant, an ex-husband / boyfriend of the victim,  
20 followed the victim in his van, then contacted her at a business establishment where he  
21 "grabbed her by the arm of her sweater and physically pulled her into the van""against  
22 her will", and while inside the van, "threaten[ed] to beat her physically" and told her she  
23 had to stay with him.

24 **II. ANALYSIS**

25 Section 2L1.2 provides for a sixteen-level Offense Level enhancement if the  
26 Defendant has been previously convicted of a "crime of violence." While the term  
27 "crime of violence" is used in various contexts in the federal code and Sentencing  
28 Guidelines, the illegal reentry guideline contains its own definition. The commentary to

1 §2L1.2 states that an offense qualifies as a crime of violence if it either constitutes one of  
2 particular enumerated crimes, none of which are relevant here, or any felony offense  
3 under state or federal law that **“has as an element the use, attempted use, or**  
4 **threatened use of physical force against the person of another.”** U.S.S.G. § 2L1.2  
5 cmt. n. 1(B)(iii)(emphasis added). The Ninth Circuit refers to this section of the crime  
6 of violence definition as the "element prong." *U.S. v. Espinoza-Morales*  
7 --- F.3d ---, 2010 WL 3516769 (9th Cir. 2010); *U.S. v. Grajeda*, 581 F.3d 1186, 1190  
8 (9th Cir. 2009). At issue in this case is whether the Defendant's prior offense of  
9 Unlawful Imprisonment fits within the enhancement's element prong.

10 **A. Identifying the "Elements" of the Defendant's Prior Offense**

11 To determine whether Defendant's prior conviction qualifies as a “crime of  
12 violence” under U.S.S.G. § 2L1.2, the court applies the approach set forth in *Taylor v.*  
13 *United States*, 495 U.S. 575, 602 (1990). *U.S. v. Grajeda*, 581 F.3d 1186, 1189 (9th Cir.  
14 2009). Under that approach, the court first considers whether a prior offense “is  
15 categorically a crime of violence by assessing whether the full range of conduct covered  
16 by the statute falls within the meaning of that If so, “there is no problem, because the  
17 conviction necessarily implies that the defendant has been found guilty of” a predicate  
18 offense. *Taylor v. United States*, 495 U.S. 575, 599 (1990).

19 U.S.S.G. § 2L1.2 cmt. n. 1(B)(iii) states that in order to qualify as a crime of  
20 violence under this provision the offense of conviction must have the use, attempted use,  
21 or threatened use of physical force "as an element." The parties' dispute in this case is a  
22 legal disagreement over how the court should construe the language "as an element."  
23 There is no dispute that the elements of an offense begin with the statute of conviction.  
24 The Unlawful Imprisonment statute under which the Defendant was convicted, RCW  
25 9A.40.040 (1), states that Unlawful Imprisonment is committed by the knowing restraint  
26 of another person. The statute thus requires two basic elements: (1) knowingly; (2)  
27 restraining another person.  
28

1  
2 It is the Defendant's position that the court can look no further than what is  
3 explicitly expressed in RCW 9A.40.040(1) to determine whether unlawful imprisonment  
4 has the use of physical force "as an element." The court finds that the inquiry here is  
5 not so restricted. The term "element," as it is used in this instance, refers to the *statutory*  
6 *definition* of the offense, which depending on how a state drafts its criminal laws, may  
7 encompass provisions other than the statute of conviction itself. *Taylor v. United States*  
8 specifically discussed the sentencing court's boundaries when the inquiry is whether a  
9 crime has the use of force "as an element" and instructs that a sentencing court's inquiry  
10 should as a general rule, "look only to the statutory definition of an offense." 495 U.S. at  
11 600. The purpose of the court's inquiry is to determine what conduct the statute of  
12 conviction proscribes. While some state statutes may be drafted in such a way that  
13 statute of conviction itself provides that information, in this instance, the Washington  
14 Unlawful Imprisonment statute is drafted with general components which are elsewhere  
15 defined in the code. If Defendant's position were the law, the 16-level enhancement  
16 would only apply in states which draft their criminal codes with explicit detailed lists,  
17 subparts and subsets. Courts have held that § 2L1.2's "as an element" language limits  
18 the scope of proper inquiry to the statutory definition of the prior offense and does not  
19 permit judicial examination of the facts behind the conviction. This court is not aware  
20 of any binding authority construing the "as an element" language as limiting which part  
21 of the criminal code the court can consider.

22 The court finds that the element of "restraint" incorporates the following sub-  
23 elements elsewhere defined in Washington law. "Restraint" is defined by statute to  
24 restrict a person's movements without consent and without legal authority in a manner  
25 that interferes substantially with that person's liberty. RCW 9A.40.010(1). A restraint is  
26 without consent if is accomplished by (a) physical force, intimidation, or deception, or  
27 (b) any means including acquiescence of the victim, if he is a child less than sixteen  
28 years old or an incompetent person..." RCW 9A.40.010(1)(a). "Substantially" is defined  
by the case law as a real or material interference with liberty, as opposed to a petty

1 annoyance, slight inconvenience, or imaginary conflict. *State v. Robinson*, 582 P.2d 580  
2 (1978), aff'd, 92 Wash.2d 357, 597 P.2d 892 (1979).

3 As this Washington statutory language reveals, there are multiple variants of  
4 criminal restraint, one of which involves physical force, but others do not. For example,  
5 a person can also commit a criminal restraint by intimidation or deception. Although the  
6 case law demonstrates that physical force or the threat of force likely is used to  
7 effectuate the restraint in most instances, it is in theory not essential in every case.  
8 Because there is more than one way of committing Unlawful Imprisonment in  
9 Washington, and not all variants require proof of force, the mere fact of Defendant's  
10 conviction alone does not tell the court whether he committed a crime of violence.

11 The Defendant emphasizes in his briefs that RCW 9A.40.010 does not have as a  
12 "requisite" or a "required element" the use, attempted use or threatened use of force. To  
13 the extent the Defendant's contention stands for the fact that force is not *always* an  
14 element in every Washington Unlawful Imprisonment case, it is precisely this fact that  
15 prohibits the conviction from qualifying as a categorical crime of violence: RCW  
16 9A.40.010 does not criminalize conduct that "falls exclusively within the federal  
17 definition of the predicate offense." However, to the extent the Defendant's position is  
18 that a criminal act can never be a crime of violence unless every imaginable way it can  
19 be committed under a statute requires the use, attempted use, or threatened use of  
20 physical force, this court rejects that position by reason of the language of *Taylor v.*  
21 *United States*, 495 U.S. 575 (1990).

22 The use of force, is a component of Washington's Unlawful Imprisonment statutes.  
23 The Washington law specifically proscribes knowingly "restrict[ing] a person's  
24 movements" by "physical force" "without legal authority in a manner that interferes  
25 substantially with that person's liberty." Accordingly, the court concludes the  
26 Defendant's conviction includes the use, attempted use, or threatened use of force against  
27 another person "as an element." Because the breadth of the statutory definition of the  
28 Unlawful Imprisonment law includes as elements a crime of violence, it is this fact

1 which distinguishes this case from the case relied heavily upon by Defendant,  
2 *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1073 (9th Cir.2007) (en banc). In *Navarro*,  
3 the court found that California's misdemeanor false imprisonment was lacking the use of  
4 force as an element and therefore, the crime of conviction could never be "narrowed to  
5 conform to the generic crime..." *Id.* Unlike in *Navarro*, the Unlawful Imprisonment law  
6 at issue in this case can be pared down to conform to the definition of a crime of  
7 violence.

8       There are many criminal laws in which the manner and means of committing the  
9 offense are not part of the statutory definition. The statutes referred to by the Defendant  
10 in his brief -- the felony elude statute described in *U.S. v. Jennings*, 515 F.3d 980, 992  
11 (9th Cir. 2008) and the assault statute in *Perez v. Mukasey*, 512 F.3d 1222 (9th Cir.  
12 2008) -- are examples of this fairly common occurrence in criminal law. Washington's  
13 Unlawful Imprisonment law, on the other hand, is one of the perhaps more unusual laws  
14 in which the manner and means of accomplishing the offense are part of its statutory  
15 definition. In this instance, the use of physical force against another person is  
16 encompassed by one of the definitions of the means and manner of committing the  
17 offense. Accordingly, because the state statute is "categorically broader" than the crime  
18 of violence definition, the court employs what is called the "modified categorical  
19 approach" outlined in *Taylor*.

20       As this court has already concluded that unlawful imprisonment is not  
21 categorically a crime of violence under the element prong, the court need not consider  
22 the Defendant's alternative argument that the Unlawful Imprisonment statute is  
23 categorically over-broad (because the state's definition of physical force suggests  
24 nonviolent force would suffice, whereas the federal definition requires that the force be  
25 violent in nature). However, the court notes the breadth of the Washington statutory  
26 language includes the use of violent physical force. *See, e.g., U.S. v. De La Fuente*, 353  
27 F.3d 766, 770 (9th Cir. 2003)(holding that if a "statute reaches both conduct that would  
28 constitute a crime of violence and conduct that would not, we turn to a modified

1 categorical approach..."); *Ramirez-Villalpando v. Holder*, 601 F.3d 891, (9th Cir.  
2 2010)(If the statute of conviction proscribes a broader range of conduct than the generic  
3 offense, we then turn to the modified categorical approach...even if the statute defining  
4 the crime is overly inclusive.").

### 5 **B. Applying the Modified Categorical Approach**

6 At one time it was an open question whether the modified categorical approach  
7 was ever appropriately applied to determine whether a conviction qualifies under the  
8 "element prong" of the crime of violence definition under § 2L1.2(b)(1)(A)(ii).  
9 However, as recently as two months ago, the Ninth Circuit held in this very context, that  
10 the modified categorical approach requires the court to "next determine...if we  
11 can-whether the conduct for which the defendant was convicted fits within the federal  
12 definition' of a crime of violence". *U.S. v. Espinoza-Morales*, --- F.3d ----, 2010 WL  
13 3516769 (9th Cir. 2010) (*quoting United States v. Snellenberger*, 548 F.3d 699, 701 (9th  
14 Cir.2008) (en banc)). Where the Defendant has entered a guilty plea, the modified  
15 categorical approach permits the court to look at a limited number of documents  
16 including "the terms of the charging document, the terms of a plea agreement or  
17 transcript of colloquy between judge and defendant in which the factual basis for the  
18 plea was confirmed by the defendant, **or to some comparable judicial record of this**  
19 **information,**" which would show that the defendant "necessarily admitted elements of  
20 the generic offense." (Emphasis supplied.) *Shepard*, 544 U.S. at 26, 125 S.Ct. 1254.

21 As applied here, the court must determine whether the Defendant's conviction for  
22 Unlawful Imprisonment was based on the use or threatened use of physical force against  
23 another person, as the Guidelines "crime of violence" definition requires. The court  
24 recognizes the point of this inquiry is to identify *what offense* the defendant committed  
25 i.e. whether the use of force type of restraint element was committed by the Defendant.  
26 Neither *Taylor* or *Shepard* authorize sentencing courts to make independent assessments  
27 of pleaded conduct, outside the record, when applying an enhancement provision that  
28 require the courts to identify the elements of a prior offense.



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2 The documentation in the record in the matter *sub judice* includes the charging  
3 information, the judgment of conviction, and the Defendant's "Statement of Defendant  
4 on Plea of Guilty" indicating that the court "may review the police reports and/or a  
5 statement of probable cause supplied by the prosecution to establish a factual basis for  
6 the plea." The information and the judgment only establish that the Defendant was  
7 charged and pled guilty to the general elements of unlawful imprisonment, the knowing  
8 restraint of another person accomplished "by physical force, intimidation or deception."  
9 Ct. Rec., Ex. 1 at 2. If these were the only documents before the court, the record  
10 would be insufficient to unequivocally establish the Defendant pled guilty to a crime of  
11 violence. *See U.S. v. Martinez-Martinez*, 468 F.3d 604, 613-614 (9th Cir.  
12 2006)(concluding that recitation of the statutory elements is insufficient to establish the  
13 nature of a prior conviction where the statute of conviction is overly broad); *U.S. v.*  
14 *Lopez-Montanez*, 421 F.3d 926, 931 (9th Cir. 2005)(holding documents insufficient when  
15 they "simply restate the language of the statute" and defendant enters a plea without  
16 elaboration).

17 However, because of the Defendant's specific consent in his written Washington  
18 plea authorizing the court to review the police reports and/or statement of probable cause  
19 to establish the factual conduct supporting the plea, this court may also permissibly  
20 consider the police incident report and the state's statement of probable cause in the  
21 "Motion and Affidavit for Arrest and Detention." Ct. Rec. Ex 4, Ex. 5. *Suazo Perez v.*  
22 *Mukasey*, instructs "'relying upon the [police report] to establish the elements of the  
23 crime' of conviction 'does not undermine the purposes of our limited modified  
24 categorical inquiry.'" 512 F.3d 1222, 1227 (9th Cir. 2008) (citations omitted). In this case,  
25 these documents serve as the evidence of the crime of which the Defendant was  
26 convicted. These documents "unequivocally demonstrate" that the Defendant pled guilty  
27 to Unlawful Imprisonment by means of the use of physical force (as opposed to the  
28 alternative means of intimidation or deception). The conviction in fact was based upon  
the specific variant of the crime involving the use of physical force against the person of



1 another, and the factual and legal element supporting the Washington conviction falls  
2 within the federal definition of a crime of violence. Accordingly, the 16-level  
3 enhancement under § 2L1.2(b)(1)(A) must be applied.

### 4 **III. Conclusion**

5 The court rejects the Defendant's restrictive approach to § 2L1.2 of the Guidelines.  
6 The Defendant's Washington crime of conviction, Unlawful Imprisonment, encompasses  
7 elements both qualifying and not qualifying as a predicate "crime of violence" for  
8 purposes of § 2L1.2(b)(1)(A). In this case, applying the modified categorical approach  
9 required the court to find, as common-sense dictates, that an individual who physically  
10 pulls his former spouse into his vehicle by the arm of her sweater, against her will, while  
11 threatening to beat her, has committed a crime that has "as an element" "the use,  
12 attempted use or threatened use of force physical force against the person of another" - a  
13 crime of violence, particularly where the statutory elements of the offense include such  
14 conduct. The Defendant's Guideline Offense Level properly included the 16-level  
15 enhancement by reason of his commission of and conviction for a crime of violence.

16 The court is satisfied the sentence announced on October 8, 2010 was rendered  
17 after proper Sentencing Guideline calculations. Accordingly, re-sentencing proceedings  
18 are not necessary and the judgment shall issue forthwith.

19 DATED this 23rd day of November, 2010.

20 s/ Justin L. Quackenbush  
21 JUSTIN L. QUACKENBUSH  
22 SENIOR UNITED STATES DISTRICT JUDGE  
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